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Nos. 80-1832, 80-2170, 80-2171

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

IMMIGRATION AND NATURALIZATION SERVICE,
Appellant,
v.
JAGDISH RAI CHADHA, ET AL.,
Appellees.

UNITED STATES HOUSE OF REPRESENTATIVES,
Petitioner,
v.
IMMIGRATION AND NATURALIZATION SERVICE, ET AL.,
Respondents.

UNITED STATES SENATE,
Petitioner,
v.
IMMIGRATION AND NATURALIZATION SERVICE, ET AL.,
Respondents.

On Appeal from and Writs of Certiorari to the United States Court of Appeals for the Ninth Circuit

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MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* AND BRIEF *AMICUS CURIAE* OF THE COUNSEL ON ADMINISTRATIVE LAW OF THE FEDERAL BAR ASSOCIATION IN SUPPORT OF RESPONDENTS

PAUL C. ROSENTHAL
COLLIER, SHANNON, RILL & SCOTT
1055 Thomas Jefferson St., N.W.
Washington, D.C. 20007
(202) 342-8400
Attorney for amicus curiae
Council on Administrative Law, Federal Bar Association

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MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* OF THE COUNCIL ON ADMINISTRATIVE LAW OF THE FEDERAL BAR ASSOCIATION IN SUPPORT OF RESPONDENTS

The Council on Administrative Law of the Federal Bar Association moves this Court, pursuant to Rule 40 of the Rules of the United States Supreme Court, for leave to

file the annexed *amicus curiae* brief. In support of this motion, *Amicus* states:

1. The Council on Administrative Law of the Federal Bar Association has a strong interest in fair administration of the laws and in maintaining the integrity of the federal system.

2. The Council on Administrative Law of the Federal Bar Association is concerned about the legislative veto provision at issue in this case, and the deleterious effect of that provision on the fair and efficient administration of the immigration laws. Specifically, the Federal Bar Association's Administrative Law Council believes that the legislative veto mechanism, as applied in this case, has deprived petitioner of his right to fundamental fairness in the processing of his deportation suspension application.

3. The Council on Administrative Law of the Federal Bar Association is of the opinion that, as a general matter, the legislative veto device is an unwise and impractical means of policing federal agencies.

4. The Council on Administrative Law presents a point of view not otherwise advocated in this case.

5. *Amicus* has obtained consent to file this brief from counsel for all parties in this case except the United States House of Representatives. Counsel for the House of Representatives has declined to provide its consent.

For the foregoing reasons, the Council on Administrative Law of the Federal Bar Association respectfully requests that its motion for leave to file the annexed *amicus curiae brief* be granted.

Respectfully submitted,

PAUL C. ROSENTHAL
Attorney for amicus curiae
Council on Administrative Law,
Federal Bar Association

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BRIEF *AMICUS CURIAE* OF THE COUNCIL ON ADMINISTRATIVE LAW OF THE FEDERAL BAR ASSOCIATION IN SUPPORT OF RESPONDENTS

INTEREST OF AMICUS

The Federal Bar Association is an association of 15,000 attorneys who are employed by or practice before Federal administrative agencies, courts and the Congress. The Council on Administrative Law, a division of the Association, consists of 1,400 Association members

who are particularly concerned about the American administrative law process.* Members of the Council on Administrative Law have extensive administrative practice experience and a detailed knowledge of the interrelationship between agencies, courts and Congress. The Council on Administrative Law has a strong interest in fair administration of the law as well as maintenance of the integrity of the federal system. The members of the Council on Administrative Law have participated in a variety of court, congressional and agency proceedings and the Council presents a point of view not otherwise advocated in this case.

INTRODUCTION AND SUMMARY OF ARGUMENT

This case involves the validity of Section 244(c)(2) of the Immigration and Nationality Act (Act), 8 U.S.C. § 1254(c)(2), which authorizes either House of Congress to veto a decision by the Immigration and Naturalization Service (INS) to suspend an alien's deportation. In the proceedings below, the Ninth Circuit Court of Appeals held that Section 244(c)(2), pursuant to which the United States House of Representatives vetoed the INS decision to suspend the deportation of respondent Jagdish Rai Chadha, violated the separation of powers doctrine embodied in the United States Constitution.

The Administrative Law Council of the Federal Bar Association (hereinafter "Council") urges affirmance of the Ninth Circuit's judgment on the merits. *Amicus* will demonstrate that the legislative veto mechanism embodied in Section 244(c)(2), and in numerous other statutes affecting private rights,[1] interferes with the

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* This brief represents the position of the Council on Administrative Law and should not be construed as the official position of the Federal Bar Association.

[1] Statutes that do not directly affect private rights, such as those that allow a legislative veto of executive reorganization plans, *see, e.g.*, 5 U.S.C. §§ 901-12 (expired), or arms sales, *see* Foreign Assistance Act of 1974, Pub.L. No. 93-559, 88 Stat. 1795-1820, raise issues that are not present in this case.

fair and efficient functioning of the administrative process. The Council believes that the legislative veto is improper, whether the mechanism is employed in an adjudicative or a rulemaking setting, because it conflicts with carefully developed tenets of administrative law.

In the adjudicative setting here presented, the legislative veto goes beyond poor policy to violate assurances of fundamental fairness accorded individuals subject to administrative justice. Whether or not the legislative veto mechanism available to the Congress under Section 244(c)(2) is actually employed to override an INS amnesty order, the device injects uncertainty and unfairness into the procedures for administration of the immigration laws. The legislative veto mechanism obliterates the safeguards established by INS procedural regulations and carefully observed by the agency in this case. It permits the Congress to ignore an essentially adjudicative decision of the Attorney General, and to do so without explanation and without consistency. Moreover, the operation of Section 244(c)(2) undermines the judicial review provisions of the statute by increasing the likelihood of improper extra-record contacts with the agency and by effectively denying any access to a tribunal that is uninfluenced by perceived congressional pressures. In short, Section 244(c)(2) operates to deprive deportees of fundamental fairness in deportation proceedings.

Should the Court employ a balancing test in assessing the legislative veto's constitutionality, the Court should be aware of the practical problems engendered by the device. Although the legislative veto is particularly harmful in the context of administrative adjudications, it similarly undermines the integrity of the administrative process when the device is used in the rulemaking context. The veto procedure inevitably thrusts the Congress into the day-to-day administration of substantive programs. The legislative veto undermines the administrative process by violating even the minimal procedural

safeguards provided in informal rulemaking. Such congressional review lacks the regularity and essential fairness that characterize judicial review upon a record developed in administrative rulemaking proceedings. The legislative veto mechanism results in inadequate records presented to courts for review. Overall, the legislative veto mechanism has an adverse impact on the administrative process without enhancing the ability of the Congress to oversee agency behavior effectively.

For these reasons, this Court should find that Section 244(c)(2) of the Act deprives petitioner and those in his position of fair and just adjudicative procedures. The Court should recognize that the legislative veto, when employed in an adjudicative or rulemaking context that is determinative of private rights, injects congressional whim into an orderly administrative process already subject to thorough judicial review.

ARGUMENT

I. Preservation Of An Orderly Administrative Process Requires A Decision On The Merits In This Case

The Council is well aware of this Court's reluctance to decide important issues of constitutional law unless the necessities of litigation so require. Counsel for the United States Senate and House of Representatives present various arguments designed to encourage the Court to dispose of this case on procedural grounds. The Court should decline to do so. Because of the Congress' increasing reliance on and advocacy of the legislative veto mechanism, the Council urges that the Court decide the constitutionality of the device. The issue is unquestionably significant and recurring. It should be decided in this case.

Contrary to assertions by counsel for Congress,[2] the legislative veto is not merely an experiment. Legislative

[2] *See* Petition For A Writ of Certiorari to the United States Court of Appeals For The Ninth Circuit in No. 80-2170 at 18.

veto provisions are contained in over 270 separate provisions of over 190 laws that have been enacted since 1932.[3] More than one-half of these provisions were adopted since 1970 and nearly one-third in the last five years alone.[4] During the 96th Congress, 220 legislative veto provisions were proposed, 58 of which were enacted into 34 different laws.[5] Indeed, inclusion of legislative veto provisions in agency authorizing legislation has become almost routine.

Congressional use of the veto provisions already enacted into law also has increased. In recent years, the Congress has rejected rules issued by the cabinet level agencies and independent regulatory commissions and currently is considering rejection of a Federal Trade Commission rule applicable to used car dealers. Congress' veto of a Federal Energy Regulatory Commission regulation is already subject to litigation.[6] Increased use of the veto is certain to spawn additional lawsuits, even though standing is often difficult to obtain in such cases.

Conflicting federal appellate court decisions leave the constitutionality of the legislative veto in doubt. *Compare* the opinion of the Ninth Circuit in this case, *Chadha v. Immigration and Naturalization Service*, 634 F.2d 408 (9th Cir. 1980) *with Atkins v. United States*, 556 F.2d 1028, 1057-71 (Ct. Cl. 1977), *cert. denied*, 434

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[3] Cavanaugh and Norton, Congressional Veto Provisions and Amendments: 97th Congress, Library of Congress, Congressional Research Service, Issue Brief #IB 81138, November 25, 1981 at 1 (hereinafter "Norton").

[4] *Id.* Between 1974 and 1978, the Congress enacted at least 48 legislative veto provisions—more than in the preceding twenty years. *See* President Carter's Special Message to Congress on the Legislative Veto, 124 Cong. Rec. H.5879 (Daily ed. June 21, 1978) (H. Doc. No. 95-357).

[5] Norton, *supra*, n. 2.

[6] Consumer Energy Council of America v. Federal Energy Regulatory Commission, Nos. 80-2184 and 80-2312 (D.C. Cir.).

U.S. 1009 (1978). Because of the difficulty of obtaining judicial review of actions taken pursuant to the legislative veto, it is doubtful that another case will come before this Court for some time that more clearly presents the question of the validity of the device.

The need for a decision by this Court has been emphasized by impartial observers of the federal system:

> Unless the Court hands down a definitive ruling, lawyers for Congress and the executive branch will continue to slug it out. Meanwhile, routine federal operations are increasingly hampered and delayed because no one seems to be in charge.[7]

In short, a decision on the merits of this case is necessary to resolve these conflicting judicial decisions and bring order to the administrative process.

II. Section 244(c)(2) Deprives Petitioner And Similarly Situated Persons Of A Fair Adjudicative Process

By injecting elements of uncertainty and unfairness into the administration of the immigration laws by the INS, the Section 244(c)(2) veto provision renders meaningless the procedural safeguards built into INS deportation proceedings. As a result, none of the participants in these proceedings has any assurance that the agency process will affect the ultimate fate of the potential deportee. Moreover, judicial review may be frustrated by lack of a proper record because of congressional pressures on the Attorney General's decision which are not reflected in the record. Nor will independent judicial review of the Attorney General's final decision be available, because congressional action on the matter will color the judicial viewpoint.

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[7] Cohen, "Legislative Veto Battle Escalates—Should Congress Have The Last Word?", *National Journal*, September 6, 1980 at 1473.

A. *Section 244 Establishes A Fair Adjudicative Procedure*

The procedures governing petitions for suspension of deportation by the Attorney General are described in the opinion below [8] and are set forth in some detail in the submissions of the parties in this litigation. Nevertheless, a brief outline of these procedures will assist this analysis of the effects of the Section 244(c)(2) veto provision upon the suspension process.

Under the Act, an alien is entitled to a hearing on the question of whether he is deportable. 8 U.S.C. § 1252(b)(1976). During the hearing, an alien may apply to the hearing officer for suspension of deportation. *Id.* § 1254(a) (1976); 8 C.F.R. § 242.17(a) (1979). The hearing officer receives evidence on the issues of grounds for deportation and suspension thereof. 8 C.F.R. § 244.1 (1979). A suspension allows the Attorney General, in his discretion, to "adjust the status to that of an alien lawfully admitted for permanent residence." 8 U.S.C. § 1254(a) (1976).

The Act specifies three general prerequisites to consideration for a discretionary grant of suspension: period of residence in the United States, good moral character, and hardship. *Id.* As stated by the Court below, "[e]ach of these prerequisites requires a legal determination of a traditional sort, the contents of which are explicated by *an orderly history of administrative practice and judicial review and interpretation.*" *Chadha v. Immigration and Naturalization Service*, 634 F.2d 408, 426 (9th Cir. 1980) (emphasis added). In addition, the Attorney General has provided procedural safeguards, including the opportunity to present evidence with respect to discretionary relief and a statement of reasons for his decision. 8 C.F.R. §§ 242.17(a), 242.18(a) (1979). The alien is afforded the opportunity to rebut even confidential information. *Id.* § 242.17(a). This

[8] Chadha v. INS, 634 F.2d 408, 425-29 (9th Cir. 1980).

Court has held that agency deportation procedures are consonant with due process. *See Marcello v. Bond*, 349 U.S. 302, 307-11 (1955).

Administrative findings of fact concerning eligibility for suspension must be supported by "reasonable, substantial and probative evidence on the record considered as a whole," 8 U.S.C. § 1105a(a) (1976), or a reviewing court will reject them. *Wong Wing Hang v. INS*, 360 F.2d 715, 716 (2d Cir. 1966). Similarly, agency conclusions as to the proper application of the statutory standards are subject to judicial scrutiny. *Dessalernos v. Savoretti*, 356 U.S. 269 (1958).

Taken as a whole, these procedures constitute a standard adjudicative scheme that provides a potential deportee with considerable protection from invidious discrimination, inconsistent application of the suspension criteria and biased fact-finding. With respect to respondent Chadha, the Attorney General's delegee conducted an independent investigation, considered evidence bearing on petitioner's character and the hardship that could result from his deportation, and made a reasoned determination to suspend his deportation.

B. *The Legislative Veto Provision Undermines The Orderly Operation Of The Suspension Process And Offers Little Or No Procedural Protection*

In order to completely vitiate the result of an adjudication by the Attorney General pursuant to the Act, all that the Congress need do is state, by one-House resolution, "that it does [or does not] favor . . . suspension . . . ." 8 U.S.C. § 1254(c)(2), (3) (1976). The statute does not require that Congress grant a hearing, state its findings and conclusions, or provide any of the procedural protections accompanying the prior administrative proceeding. Although the alien's attorney may discuss his client's case with congressional commit-

tee staff, there is no opportunity for a formal hearing with either staff or Members of Congress.[9] The statute does not mandate that the Congress consider only those criteria articulated in the Act; the Congress may uphold or overturn a decision of the Attorney General on the basis of discriminatory bias, pure politics or even an unstated quota standard.[10] And unlike the agency, the Congress need not explain any departure from prior precedents in order to account for the disparate treatment accorded similar cases. *See Secretary of Agriculture v. United States*, 347 U.S. 645, 652-53 (1954).

Because there are virtually no procedural constraints on congressional decisionmaking under Section 244(c)(2), the protections afforded at the agency level are, from the alien's vantage point, wholly empty. There is no guarantee that the Government will act in a regular, predictable manner as to him. The administrative record, established in an adjudicative hearing, may be, and usually is, ignored by the Congress.

Moreover, the veto mechanism in effect short-circuits the judicial review procedures established by the Act. As the Congress may set aside suspensions for any or no reason at all, efforts on the part of the courts to ensure consistent application of the statutory criteria are doomed to failure. *See Chadha v. INS*, 634 F.2d at 430-31. If the judiciary engages in review of the Attorney General's final disposition of the case subsequent to congressional action under Section 244(c)(2), it is un-

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[9] Many, if not most, Members will vote on the suspension of an alien with little or no prior consideration. *See* Chadha v. Immigration & Naturalization Service, 634 F.2d at 427.

[10] For example, the Congress may one day decide that the Attorney General is granting too many suspensions, and may on this basis override particular decisions. *But cf.* Asimakopoulos v. INS, 445 F.2d 1362, 1365 (9th Cir. 1971) (Board of Immigration Appeals must apply statutory standards in classifying aliens eligible for suspension).

likely to proceed in its customarily independent, unbiased manner. To the contrary, the courts will inevitably be influenced by the prior congressional decision even if the ultimate act of deportation is taken by the Attorney General. *See* Bruff & Gellhorn, *Congressional Control of Administrative Agencies: A Study of Legislative Vetoes*, 90 Harv. L. Rev. 1369, 1429-33 (1977) [hereinafter cited as *Bruff & Gellhorn*]. In fact, this Court has in the past displayed considerable reluctance to review agency decisions that are subject to congressional review or control. *See Panama Canal Co. v. Grace Line, Inc.*, 356 U.S. 309, 318-19 (1958); *Perkins v. Lukens Steel Co.*, 310 U.S. 113 (1940).

Thus, whether court review occurs before or after the congressional decision, the alien is unlikely to obtain fair and meaningful judicial review. The legislative veto eviscerates the judicial power to review and protect the legal rights of individual aliens affected by government action.

The use or potential use of the veto mechanism also undermines the adjudicative process under Section 244 of the Act by increasing the likelihood of improper *ex parte* influence upon administrative actions. As a general matter, federal court decisions hold that when external pressure is brought to bear on adjudicative administrative decision-making, the parties involved have been deprived of fair process. For example, in *Pillsbury Co. v. FTC*, 354 F.2d 952 (5th Cir. 1966), a Senate subcommittee questioned FTC personnel, including Commissioners, with respect to a specific enforcement action then before the Commission. The Commission had not yet reached a final decision in the case; in fact, the company had not yet presented any of its rebuttal evidence. Noting that the congressional investigation focused "directly and substantially upon the mental decisional processes of [the] Commission *in a case pending before it*," the court held that the right to a fair trial with the

appearance of impartiality "cannot be maintained unless those who exercise the judicial function are free from powerful external influences." *Id.* at 964 (emphasis in original).[11]

Whether or not the Congress actually exercises its authority under Section 244(c)(2), the veto procedure inevitably affects the adjudication by the Attorney General of petitioner's status. Prior to actual congressional "review" of his decision, the prospect of such review may cause the Attorney General or his hearing officer to attempt to adjust findings or rulings to comport with perceived congressional preferences. This additional congressional leverage may lead the Attorney General or his designee to discuss particular suspension proceedings with Members of Congress or their staffs. Such extra-record pressure cannot, consistent with procedural fairness and with the statutory scheme, play any part in the ultimate adjudication of an alien's suspension petition. Moreover, the failure of the administrative record to reflect such pressures may render ineffectual subsequent judicial review.

In summary, the legislative veto established in Section 244(c)(2) empowers the Congress to overrule decisions of the Attorney General that are reached after full, adjudicative administrative proceedings. These proceedings are characterized by careful adherence to traditional procedures designed to protect the substantive rights of individuals faced with deportation from the United States. Nothing mandates that the Congress adhere to

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[11] *See also* D.C. Federation of Civic Assoc. v. Volpe, 459 F.2d 1231, 1246 (D.C. Cir. 1971), *cert. denied*, 405 U.S. 1030 (1972) (agency decision-making invalid if based to any extent on pressures emanating from Congress (rulemaking)); Sangamon Valley Television Corp. v. United States, 269 F.2d 221, 224, 106 U.S. App. D.C. 30 (D.C. Cir. 1959) (when agency proceeding involves conflicting claims to a valuable privilege, ex parte contacts violate due process); 2 K. Davis, Administrative Law §§ 12.01 *et seq.* (1958) (discussing effects of bias in agency decisionmaking).

these or any other procedures in the exercise of its veto power. Moreover, because review authority is lodged in the Congress, effective, independent adjudication of suspension cases by both the agency and the reviewing court is substantially jeopardized. Thus, no matter how scrupulously the Attorney General and the courts strive to exercise their responsibilities under the Act, the legislative veto provision inevitably diminishes the integrity and effectiveness of their decision-making.

These considerations compel the conclusion that Section 244(c)(2) undermines the administrative process and deprives petitioner and similarly situated aliens of a fair adjudicative proceeding.

III. The Legislative Veto Seriously Undermines The Rulemaking Process

The practical defects inherent in the legislative veto mechanism as used in administrative proceedings are strikingly apparent in the context of agency rulemaking. Many of the legislative veto provisions enacted in recent years pertain to rulemaking proceedings of executive departments and agencies. Because any decision by this Court on the merits of the legislative veto will affect the use of the device in rulemakings, it is important that the Court closely examine the practical effects of congressional vetoes of agency rules.

The legislative veto thwarts rulemaking procedures at the agency level and substitutes hasty and standardless congressional review for meticulous, on-the-record judicial consideration. Moreover, the legislative veto is not only disruptive of established procedures and judicial review, but also unnecessary to further the avowed congressional objective of strengthening the oversight function. The Congress has several alternative means of overseeing agency action. The Council believes that vigorous pursuit and refinement of these alternative mecha-

nisms is far preferable to the procedurally debilitating legislative veto.

A. *The Specter Of A Legislative Veto Undermines The Fairness Of Rulemaking Proceedings*

Since the inception of the modern administrative agency, this Court and the lower federal courts have compelled strict adherence to the rule that administrative decisions must be both reasoned and reasonable. When engaging in either rulemaking or adjudication, an agency must base its decisions on the prescribed statutory standards, *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 415-16 (1971); *Environmental Defense Fund, Inc. v. EPA*, 636 F.2d 1267, 1283 (D.C. Cir. 1980), and on the record before it, *Home Box Office, Inc. v. FCC*, 567 F.2d 9, 54 (D.C. Cir.), *cert. denied*, 434 U.S. 829 (1977); *Seacoast Anti-Pollution League v. Costle*, 572 F.2d 872, 877 (1st Cir.), *cert. denied sub nom. Public Service of New Hampshire v. Seacoast Anti-Pollution League*, 439 U.S. 824 (1978). Agency action based upon improper considerations must be overturned. *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. at 420-21.

The major requirements of the Administrative Procedure Act for informal rulemaking are that proper notice be given to the public and that interested persons have an opportunity to present their views. *See* 5 U.S.C. § 553 (1976). In recent years, the courts and the Congress have imposed additional but nevertheless minimal requirements to assure a fair administrative process. The purposes behind these added requirements have been summarized as follows:

> One is to assure fair treatment of persons submitting comments by requiring actual agency consideration and response. A second is to foster reasoned agency decision-making by exposing thinking within the agency to public criticism and by requiring rea-

> soned resolution of the issues. A third is to facilitate judicial review by providing a record to justify a final rule.

Bruff & Gellhorn at 1376-77. The legislative veto has a serious adverse effect on even these relaxed procedural safeguards. As a result, the Administrative Conference of the United States, a prestigious body of government officials and public experts in administrative law, adopted in 1977 a recommendation against the legislative veto of agency rules. *See* 1 C.F.R. § 305.77-1 (1981).

The reasons for rejecting the legislative veto are clear and compelling. The Congress, in exercising legislative veto power, is neither bound by the agency rulemaking record nor required to create one of its own. Congress need not obtain comments from affected persons, nor must it consider any of the views managed to be presented. In short, at the stage of congressional review, the agency's record, however carefully constructed, is likely to become irrelevant. Unfortunately, there is no guarantee that any other record will replace it.

Moreover, the possibility of congressional review may subvert the agency's own construction of a record in two ways. First, affected parties may decide to withhold their best evidence and arguments until the point of congressional review because they know that the agency's record may prove unimportant, and that opposing parties will have less opportunity to rebut that evidence during the limited congressional review period. Second, the agency's decision-makers may be inclined to negotiate over the regulation with Members of Congress (or congressional staffs) during the final decisional process in order to prevent a veto. *See* Bruff & Gellhorn at 1409-12. This *ad hoc*, extra-record manner of decision-making further undermines the rulemaking process. Agency speculation on the effects of pressure on the Congress and the actual application of pressure by the Con-

gress during negotiations contravene the purposes of established procedural safeguards. *See id.*

B. *The Legislative Veto Obstructs Thorough, Independent Judicial Review Of Rulemakings*

One of the primary reasons why lower courts and this Court have insisted upon fairness and regularity in rulemaking procedures is to ensure that administrative decisions are accompanied by a record suitable for judicial review. Only if the reviewing court has before it a complete record of what factors actually influenced the decision-maker can it determine whether or not the regulation was issued in a proper manner.

By reducing the value of agency rulemaking records and providing for unchanneled congressional review, the legislative veto impairs the proper functioning of the courts. As discussed above, absent an adequate record for review, judicial scrutiny of regulatory decisions is hampered. Judicial review suffers, too, when it must follow and evaluate an essentially political act or failure to act by the Congress.

As is the case with congressional review of immigration proceedings, no meaningful standards exist or could be devised for legislative review of rulemakings. The only operative standard is whether or not a resolution disapproving any agency rule can attract the requisite majority of votes cast. Effective judicial review of such standardless action can only be illusory.

C. *The Congressional Review Process Provided By The Legislative Veto Mechanism Is Inadequate and Unnecessary*

Most statutes implementing congressional veto provisions provide that review take place within a limited period of time.[12] The Congress may have only a few months or less to review rules promulgated by an agency

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[12] *See generally* Norton, *supra*, p. 2-7 & n.2.

pursuant to years of study and voluminous and highly technical findings of fact. Administrative records compiled in rulemaking proceedings are often lengthier and more complex than adjudicatory records. Rulemaking records exceeding 50,000 pages are not uncommon. Because of the short review period involved, rules subject to congressional review may receive at best only cursory evaluation by a few Members of Congress or their staffs. Indeed, one empirical study of veto provisions found that "the existing time pressures on Congress significantly affected the quality and thoroughness of congressional review." Bruff & Gellhorn at 1414.

Even if lengthier review periods were provided, it is unlikely that Members and their staffs would have adequate time to perform thorough review of regulations while discharging concurrent legislative duties.[13] Or, congressional review might engender delays that result in no decision from either the Congress or the agency, leading to confusion among regulated entities. The prospect of any more delay in what is often already an unduly lengthy process is hardly welcome. In cases where the period for congressional review is tolled by adjournment, the additional delay could easily exceed several months.

The legislative veto, particularly one that provides the Congress with little time to review agency rulemaking and that specifies no standard for review, also reduces the effectiveness of public participation in legislative proceedings while increasing the influence of interest groups that enjoy access to congressional decision-makers. *Id.* at 1412-14. As agency officials speculate as to how the Congress will act and tailor their decisions accordingly, private participants with the financial wherewithal and political power turn their attention to the Congress. Although the problem of special interest pres-

[13] *Id.*

sure is endemic to the legislative process, a requirement that the Congress act hastily through the legislative veto exacerbates these pressures on fair and open agency rulemaking procedures.

The Council fully agrees with the goal of effective congressional oversight. The legislative veto, however, is unnecessary to this end. Congress has a multitude of methods by which to oversee the process [14] including, of course, the passage of legislation to overturn agency actions. For example, the Congress speedily passed legislation overturning the safety belt interlock regulation, which had aroused widespread public concern.[15] The Congress has also passed legislation requiring an 18-month delay to the saccharin ban proposed by the Food and Drug Administration.[16] More recently, the Congress approved legislation changing regulatory standards for power lawnmowers.[17] Whether or not one is in sympathy with these congressional actions, it is clear that the Congress can, when it so desires, control perceived administrative excesses by enacting legislation that is acted upon by both Houses and presented to the President for his signature. The legislative veto is thus not only unwise, but also unnecessary.

CONCLUSION

The legislative veto device disrupts the administrative process without benefitting the congressional oversight function. Moreover, the legislative veto lacks any semblance of orderly and thoughtful decision-making. In-

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[14] *See generally* 2 Study on Federal Regulation, Committee on Governmental Operations, U.S. Senate, 95th Cong., 1st Sess. (1977).

[15] Motor Vehicle and Schoolbus Safety Amendments of 1974, Pub. L. No. 93-492, § 109 (1974).

[16] Saccharin Study and Labeling Act, Pub. L. No. 95-203, 91 Stat. 1451 (1977).

[17] Omnibus Budget Reconciliation Act of 1981, Pub. L. No. 97-35, 95 Stat. 357 (1981).

deed, the congressional veto may be viewed as the unnecessary and improper pause.

The increased use and abuse of the legislative veto mechanism requires a decision on the merits of this case. Respondent Chadha has already been subjected to a chaotic and unfair process which has been visited upon him because of the legislative veto. Countless other holders of private rights will also be adversely affected by the continued adoption and exercise of the legislative veto in rulemaking proceedings. *Amicus* respectfully requests that the Court bear these considerations in mind as it rules in this case.

Respectfully submitted,

PAUL C. ROSENTHAL
COLLIER, SHANNON, RILL & SCOTT
1055 Thomas Jefferson St., N.W.
Washington, D.C. 20007
(202) 342-8400
Attorney for amicus curiae
Council on Administrative Law,
Federal Bar Association